Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/17834/2015
IA/17840/2015
IA/17843/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On May 4, 2017	**On May 15, 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MRS TEMITOPE ESTHER ALLINSON
[T A]
[S A]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr F Abe, Legal Representative
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. The appellants are Nigerian nationals. The first-named appellant is the mother of the second and third-named appellants who were born on [ ] 2007 and [ ] 2013.

3. On February 15, 2015 the appellants each made an application for leave to remain on the basis of human rights under both the Immigration Rules and Article 8 ECHR. The respondent refused those applications on April 22, 2015 and the appellants appealed those decisions on May 11, 2015 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.

4. Their appeals initially came before Judge of the First-tier Tribunal Zahed (hereafter referred to as the Judge) on June 24, 2016 and in a decision promulgated on September 28, 2016 the Judge dismissed their appeals. The appellants lodged their grounds of appeal and permission to appeal was given by Judge of the First-tier Tribunal Grimmett on February 2, 2017 and the matter came before myself initially on March 9, 2017 when I heard representations on whether there had been an error in law.

5. Although the second and third appellants' names continue to appear on the list I ascertained at the previous hearing they had both been granted British citizenship on the basis of naturalisation and consequently the Judge should have treated their appeals as abandoned under Rule 16 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Both Mr Avery and Mr Abe agreed with this position and their appeals should therefore be formally marked as abandoned.

6. Having taken submissions it was accepted that the first named appellant could not satisfy the Immigration Rules because at the date of application neither child was a British citizen and under Appendix FM of the Immigration Rules and paragraph 276ADE, HC 395, this was a prerequisite.

7. I found there had been an error in law as the Judge failed to give full consideration as to whether it was in the children's best interests for them to remain when considering article 8 ECHR.

8. I preserved the credibility findings made by the Judge in paragraphs 8 to 14 of his decision and I directed that the case be listed for further oral evidence and documentary evidence that was served under Rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

9. At the resumed hearing that took place on the above date I took oral evidence from the appellant. She was cross-examined by Mr Avery and she maintained that she and the children's father, Mr Allinson, had separated after the second child was born

in 2013. It was put to her that the Judge had previously rejected her claim that they were living separately and she confirmed that she had nothing else to add to the earlier evidence she had previously given and she maintained that they lived separately. She was asked whether they were in a relationship before she came to the United Kingdom and initially she claimed that they had met each other here but when pushed she then stated that they met each other in Nigeria and she apologised for the error. The only contact she had now was because of the children. She was then asked about the children's nationality applications and she confirmed that she had signed the application form at the solicitor's office and she was aware the application had been submitted. She was asked why the children's father had stated he was at her address and she suggested that this was because documents would need to be sent somewhere. It was pointed out that all documents were sent to the solicitor but she could not assist any further on that point. She also confirmed that Kim Ward had signed the document as a referee but could not add further information about that. She was also unaware that he had obtained his residency status as the partner of an EEA national and that he had been granted this in 2014 and this was despite her claim that they had been together until 2013. Her previous asylum application was also put to her and she denied that the person she claimed she was fleeing from was Mr Allinson.

SUBMISSIONS

10. Mr Avery submitted that the appellant's application to remain in her own right had absolutely no merit based on her very poor immigration history. He pointed out that she had been here for seven years before she made an application to regularise her immigration status and that having come here as a visitor her status was always precarious. This appellant could only succeed on the back of the fact she has two children who have now been naturalised as British citizens. Mr Avery submitted that the fact she had entered the United Kingdom illegally, overstayed and had had previous applications refused and then failed to leave the country were factors the Tribunal could consider. There were several adverse credibility findings made against the appellant by the Judge who originally heard her case. That Judge had specifically rejected her claim that she had sole responsibility for the children and Mr Avery submitted there was nothing new advanced today that would persuade a Tribunal to depart from that earlier finding. She had given conflicting evidence about when she met Mr Allinson and there was also the fact that Mr Allinson appeared to have obtained permanent residency as an EEA national spouse, estranged or otherwise, in 2014 and this was despite her claim that they lived together until 2013. Her evidence was therefore conflicted and lacking in credibility and no weight could therefore be placed upon anything she was saying. When the naturalisation documents were submitted Mr Allinson's address was recorded as the same as her address and the support worker had signed the application form supporting it and Mr Avery submitted she would not have done so if the information was incorrect. The only additional evidence that had recently been submitted that would assist the court were the letters from Haseltine Primary School who confirmed that both children attended school with Triumph joining the school in April 2013 and Sophie joining the school in September, 2016.

11. Mr Avery submitted that in considering this appeal regard should be given to Section 117B of the 2002 Act and whilst he accepted Section 117B(6) of the 2002 Act states that public interest does not require her removal where she has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect that child to leave the United Kingdom he nevertheless argued that case law makes clear that that this is a standalone consideration but evidence of criminality and a very poor immigration history could outweigh that and could also outweigh the respondent's own policy that was set out in a document entitled "Family life as a partner or parent and private life 10-year route" dated August 2015. Although the policy was not formally in place at the date of the decision it was in date when this matter came before the Tribunal and of course remains in force today.

12. He submitted that following the guidance at paragraph 11.2.3 it would be reasonable to expect the child to leave the United Kingdom. Mr Avery pointed out that her conduct in entering illegally could have opened her up to prosecution and she has a very poor immigration history. Mr Avery acknowledged the recent decision of SF & Others (guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) but he submitted that this was one of those cases where it would not be unreasonable to require the children to leave.

13. Mr Abe rejected Mr Avery's submissions and maintained that as the children were British citizens it would not be reasonable to expect them to leave the United Kingdom especially as they had lived all their lives here. The children had been born here and had never been to Nigeria and were currently attending school. Mr Avery's submission on criminality had no basis as she had not been charged with any offence and it had never been suggested that she was at risk of being charged with any offence. Whilst he acknowledged her immigration history was poor he pointed out that she had taken steps to regularise her status.

14. It is against that background that I make my findings.

FINDINGS

15. I am dealing today with an application by an appellant who seeks to remain here under Article 8 ECHR because she did not satisfy the Immigration Rules pertinent to her application. When the applications were submitted, the children did not have British status but I am satisfied, having looked at the recent bundle that both the second and third named appellants are British citizens and that a naturalisation certificate for both of them had been issued on April 12, 2016. That application was submitted by the children's father and it seems to have been issued on the back of him obtaining permanent residence to reside in the United Kingdom.

16. This issue was raised by Mr Avery at the hearing but it seems to me that I have to approach this appeal on the basis that the children have British citizenship lawfully unless someone says otherwise. I have no reason to go behind either certificate and of course both children have been issued with British passports which were shown to me at the hearing.

17. I found the appellant to be very evasive and it is still unclear what role exactly Mr Allinson plays in both hers and her children's lives. The appellant maintains that his role is limited to the children and that they separated in 2013 but the naturalisation documents that were referred to at the hearing suggested that in 2016 his address was the same as hers which maybe points to him having a larger role than the appellant suggested.

18. The courts have spent some time considering whether it would be reasonable for a child, who is British, to leave the United Kingdom where their mother/father/primary carer has no status.

19. The position I am faced with is that the appellant came here on a temporary visa and overstayed and whilst attempts have been made to regularise that status they had been rejected at every point by either the respondent or a court. Mr Avery suggested that her behaviour could be viewed as falling below the threshold set out in paragraph 398 of the Immigration Rules. The appellant has never been investigated for any criminal offence and I do not believe or find that her actions would engage this element of the guidance and amount to a countervailing circumstance which would enable the respondent to go against her own policy.

20. There is a very poor immigration history and Mr Abe whilst suggesting she had taken steps to regularise her status has not persuaded me that her immigration history is anything but "very poor".

21. The issue is further complicated by the respondent's own policy that was issued in August 2015 and in particular the guidance given at 11.2.3. That guidance makes it clear that save in cases involving criminality the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU. The guidance reflects the European Court of Justice judgment in Zambrano. Where a decision to refuse the application would require a parent or primary carer to leave the EU the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer and in such cases it will usually be appropriate to grant that parent leave to enable them to remain with the child provided that there was satisfactory evidence of a genuine and subsisting parental relationship. The guidance however makes it clear that where the parent's conduct gives rise to considerations of such weight then if the child could stay with another parent then leave could be refused.

22. Since I heard this appeal but before I prepared my decision, the decision of Chavez-Vilchez [2017] EUECJ C-133/15 was issued. The Court expanded the Zambrano approach further stating-

> "70. In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the

> Member State concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.
>
> 71 For the purposes of such an assessment, the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium."

23. The Tribunal in SF & Others considered the respondent's policy and the correct approach and noted at paragraph 8 that in deciding what approach to take consideration should be given to the possibility of the British child staying with another parent or alternative primary carer. The Tribunal noted in that case that there was no criminality and concluded at paragraph 9 that it was inevitable that the appellants in that case (mother and child) should have been granted a period of leave to enable the British citizen child to remain in the United Kingdom with them. The Tribunal noted that the guidance is an important source of the respondent's view of what is to be regarded as reasonable. At paragraph 12 the Tribunal made clear that where there is clear guidance where an assessment has to be made and that guidance clearly demonstrates what the outcome of the assessment would have been the Tribunal should take that guidance into account and apply it. The Tribunal went on to find it would be unreasonable to expect the youngest child to leave the United Kingdom and consequently allowed the mother's and other sibling's appeals.

24. The recent decision of Chavez-Vilchez merely reinforces this position and making it clear that even where the EU national parent could possibly look after the children regard must still be had to "the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium".

25. The issue therefore for me to decide is whether there is a genuine and subsisting relationship between the appellant and her children and I find that there is.

26. Following Section 117B(6) I then have to consider whether it would be reasonable to expect the child to leave the United Kingdom. The appellant's mother has a very poor immigration history but these children were born and have lived their lives in the United Kingdom. There is no criminality in this appeal and the status of the children's father raises more questions than answers. If he obtained his status as the partner of an EEA national then it seems unlikely that he would have been living with the appellant. Evidence would have had to be submitted to support the permanency of that relationship. The position however is further complicated in that that certificate was obtained in 2014 but when the application for nationality was submitted in 2016 Mr Allinson had put his address as the appellant's.

27. However, I have to consider the fact that if the appellant is removed then that would leave the two young children and in particular Sophie without their mother with no real prospect of her ever being granted leave to rejoin her children who are both recognised as British citizens and who have never ventured outside of this country. These are young children with a high dependency on their mother with whom they live and if the mother was removed that would almost certainly affect their equilibrium.

28. In spite of the adverse findings made I conclude that Section 117B(6) of the 2002 Act is not outweighed by any of the other factors in Section 117B of the 2002 Act and in light of the respondent's own policy and the guidance given by the Tribunal and Court in SF & Others and Chavez-Vilchez I allow the first named appellant's appeal.

Notice of Decision

29. There was a material error in law and I set aside the decision. I have remade the decision and in respect of the first named appellant I allow her appeal under Article 8 ECHR.

30. With regard to the second and third named appellants I treat their applications as abandoned for the reasons set out earlier.

31. No anonymity direction is made.

Signed Date May 12, 2017

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award as I have allowed this appeal based on information that has subsequently been served.

Signed Date May 12, 2017

Deputy Upper Tribunal Judge Alis